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Supreme Court, U.S.
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No. 00-1683

IN THE

Supreme Court of the United States

CHURCH OF SCIENTOLOGY INTERNATIONAL,
Petitioner,

—v.—

TIME WARNER, INC., TIME INC. MAGAZINE COMPANY, and RICHARD BEHAR,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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1. Respondents Attempt to Obscure the Court of Appeals' Refusal to Follow *Masson*

In a cluster of questionable rulings, the court of appeals' refusal to abide by the clear import of *Masson* v. *New Yorker Magazine*, 501 U.S. 496, 523 (1991), stands out as particularly egregious. *Masson* holds that it is up to the states to decide whether to enunciate defamation norms that are more protective than the actual malice rule of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). *Masson* refused to create a federal common law of libel in the guise of a gloss upon the First Amendment. The court of appeals' decision, however, attempts to eviscerate *Masson* by creating a new, constitutionally grounded, "subsidiary meaning doctrine" which, as applied here, amounts to little more than the rejected "incremental harm" doctrine.

Respondents try to deflect the Court's attention from the court of appeals' improper departure from the Court's jurisprudence, by relegating the issue to secondary status and surrounding it with an attack on petitioner. Respondents then claim that what the court called its "grounds for decision" in *Herbert* v. *Lando*, 781 F.2d 298, 312 (2d Cir. 1986) (*Lando II*), and Judge Kozinski's remark that those grounds for decision were "quite unexceptional," *Masson* v. *New Yorker Magazine*, 895 F.2d 1535, 1565-66 (9th Cir. 1989) (Kozinski, J., dissenting), provide support for respondents' argument that the subsidiary meaning "doctrine" differs in a fundamental manner from the libel-proof and incremental harm doctrines. But neither *Lando II* nor Judge Kozinski in *Masson* made the slightest suggestion that they were creating or envisaging a new legal "doctrine." *Lando II* was a narrow *holding* based on a

discrete and unique set of facts: the statements at issue provided *evidentiary support* for a number of specific, closely related factual allegations made in a set of nonactionable statements. As Judge Kozinski observed, because those statements "merely impl[ied] the *identical* view" as the nonactionable statements, the holding was indeed "quite unexceptional." *Id.*

In this case, in contrast, the Vancouver statements were not mere evidentiary support for other specific non-actionable statements; rather, they were intentionally printed in a *separate sidebar* and different from the non-actionable allegations of the article in general, in that they were the only allegations to suggest that the Church defrauded the *general public*.

Precisely because the Vancouver sidebar was distinct, separate and *additional* to the allegations made in the rest of the article,[1/] the newly conceived "subsidiary meaning doctrine" and its application to this case *cannot* be distinguished from the incremental harm doctrine. Indeed, the courts below did exactly what *Lando II* and Judge Kozinski were careful not to do. As

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1/ Respondents attempt to soften the sting of the Vancouver and Fishman statements by emphasizing that "the district court held that ... references in two of those four passages [i.e., the Vancouver and Fishman passages] to the activities of individual Scientologists failed to satisfy the 'of and concerning' requirement." (Br. in Opposition at 2.) The court of appeals, however, assumed that the entirety of the statements alleged in the complaint met the "of and concerning" requirement, *see* App. A, 8a, and the Court should proceed in accordance with that assumption.

Judge Kozinski put it, the holding in *Lando II* was "a far cry from saying ... that *any* statement in a publication cannot be defamatory if the publication already contains a statement that is equally defamatory but unactionable...." *Masson*, 895 F.2d at 1565-66.

Respondents further attempt to avoid certiorari by speculating that the district court, upon remand, would dismiss the Vancouver claim in any event under the incremental harm doctrine by applying New York law (Br. in Opp. at 23, n. 16). This is incorrect. First, while the courts below did not reach the issue, California, not New York, law applies in this case, and California does not recognize the incremental harm doctrine.[2/] Second, New York has not recognized the doctrine.[3/] Third, even

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2/ New York, the forum state, applies a complex multi-factor choice of law test, the most important factor being the place where the plaintiff suffered the most substantial injury. *See Davis* v. *Costa-Gavras*, 580 F. Supp. 1082, 1091 (S.D.N.Y. 1984). In this case, the balance of interests tips decidedly in favor of California law. The Ninth Circuit, per Judge Kozinski, has held that California has not and would not recognize the incremental harm doctrine because it is a "bad idea." *Masson* v. *New Yorker Magazine*, 960 F.2d 896, 898 (9th Cir. 1992) (quoting *Liberty Lobby Inc.* v. *Anderson*, 746 F.2d 1563, 1569 (D.C. Cir. 1984) (Scalia, J.)).

3/ Respondents mis-cite two cases in support of the proposition. *Jewell* v. *NYP Holdings, Inc.*, 23 F. Supp.2d 348 (S.D.N.Y. 1998), merely reaches the (disputable) conclusion that New York courts *would* recognize the doctrine. *Fulani* v. *New York Times Co.*, 260 A.D.2d 215, 686 N.Y.S.2d 703 (N.Y. App. Div. 1999), does not recognize or even mention the incremental harm doctrine, but rather addresses the *substantial truth* doctrine. For a discussion of the differences between these doctrines, see, *e.g.*, J. H. King, Jr., *The*

if it did recognize the doctrine in some form, there is no basis to speculate that it would apply it to the Vancouver sidebar under the circumstances of this case.

2. The Court of Appeals' Decision Invites Trial Courts to Consider Bias as Strong Evidence of a Lack of Actual Malice, Contrary to *Harte-Hanks* and *Liberty Lobby* and to Every Other Circuit

A journalist's animus or bias, whether based on pure prejudice or upon knowledge of actual or alleged past misconduct, certainly can cause the journalist to approach his subject in a predetermined manner, and can lead him to willfully ignore or suppress favorable evidence to his subject.

In this case, as set forth in the Petition, there was more than substantial evidence that Behar was highly inflamed against CSI, and that his bias, whatever its origin, led him to engage in a one-sided, result-oriented investigation and report, particularly with respect to the Fishman and Vancouver statements. For example, Behar failed to interview the FBI agents who investigated Fishman and determined he had lied with respect to both death threat allegations; failed to obtain or read the entire transcript of Fishman's sentencing; ignored or failed to obtain the report of the prison psychiatrist who determined that Fishman "manipulated everything about him his entire life" and "will manipulate all his life until he dies"; and refused to credit or even report the views of the prosecuting attorney, who thoroughly

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Misbegotten Libel-Proof Plaintiff Doctrine and the "Gordian-Knot" Syndrome, 29 Hof. L. Rev. 343, 374-76 (2000).

investigated Fishman and determined that he lied about everything he told government officials. Behar purported to rely principally on the account of Fishman's hypnotist-therapist Geertz, who had accepted as true proven lies of Fishman and whose defense of Fishman was rejected by the prosecutor, the probation officer, and the federal sentencing judge. Worse, Behar failed even to mention in his article that Fishman had been convicted for trying to frame CSI for the very crimes Behar reported.

Respondents' argument – that Behar was justified in his actions and did engage in an adequate investigation despite his bias – should have been made to a jury; it is not sufficient to compel summary judgment as a matter of law. *Anderson* v. *Liberty Lobby*, 477 U.S. 242, 255 (1986)("The drawing of legitimate inferences from the facts are jury functions, not those of a judge"); *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 667-68 (1989). The court of appeals' approval of the district court's grant of summary judgment on the ground that Behar's bias proves his belief in his false statements and thus his lack of actual malice is contrary to those decisions and to a host of circuit court decisions holding that a writer's bias is evidence of actual malice.[4/]

4/ See Pet., nn. 18, 19 (contrasting abundant decisions of state supreme courts and federal circuits holding that ill will is relevant to show actual malice, with rare decisions holding that ill will is not relevant to such determination). No court has suggested what the courts below did: that ill will or bias should be considered as strong evidence of an *absence* of actual malice, justifying summary

Contrary to respondents' assertion, the court of appeals did *not* merely approve the district court's statement that the "speaker's belief in his statements, even his exaggerations, enhances, rather than diminishes, the likelihood that that they are protected." Rather, the court carefully made this statement in the context of a neatly argued paragraph which also stated that the district court "properly applied the actual malice standard" when it found: (1) that "bias" would support a finding of actual malice only "if it were coupled with evidence of an *extreme departure* from standard investigative techniques" and (2) that petitioner failed "to make its evidence of bias probative of actual malice, *rather than probative of lack thereof.*" (App. A 10a) (emphasis added). Read as a whole, the passage clearly suggests that, because "belief" and "exaggerations" must be regarded as *enhancing* the likelihood that statements are made without actual malice, the district court properly weighed the existence of "bias" as proving an absence of malice as long as there is no "extreme departure." The court of appeals' conclusion thus does violate the Court's holding, in *Harte-Hanks*, that the question of which way an author's bias cuts ordinarily is a jury question. *Id.*, 491 U.S. at 667-68, 692.[5/]

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judgment on behalf of a defendant unless a plaintiff can demonstrate an "*extreme* departure from standard investigative techniques" (Pet., App. A, 10a) (emphasis added).

5/ Respondents' assertion that Professor Neuborne conceded Behar's good faith at oral argument below (Br. in Opposition at 4, 12), is frivolous on its face.

3. Respondents' Attempt to Create a New Variant of the Libel-Proof Plaintiff Doctrine – the Actual-Malice-Proof Reporter – is Not a Proper Basis to Deny Certiorari

In the wake of the Court's explicit rejection of the incremental harm doctrine and implicit rejection of the libel-proof plaintiff doctrine in *Masson*, respondents attempt to achieve the same result by positing what in effect is an "Actual-Malice-Proof Reporter" doctrine. Rather than directly argue that a plaintiff may have no redeemable reputation, respondents claim that a reporter, informed of prior accounts of alleged misdeeds of his subject, in effect can never be found to have acted with actual malice in making new allegations of comparable misdeeds against that subject. The effect, of course, is the same – the subject is rendered fair game to any and all false and defamatory statements, not only for alleged acts widely reported in the past but, apparently, for any new or future alleged acts.

Thus, in pointing to allegations of earlier wrongs allegedly committed by Church officials, respondents conceal and elide the crucial chronological distinction between those earlier allegations and the defamatory allegations at issue in this case. The article appeared in 1991. Nearly all the allegations of misconduct upon which respondents now rely in arguing that they had a good faith belief in the claims set forth in the article (Br. in Opp. at 6-7, 14-16) purportedly took place years earlier. Indeed, while in the past certain church officials concededly committed improper acts, CSI submits that most of the allegations of past misconduct were false

and distorted, the result of the misunderstanding, suspicion and prejudice that typically greet a new religion. Moreover, as respondents were fully aware, Scientology religious leaders removed those officials implicated in acknowledged past misdeeds, and reorganized church structure, at which time CSI was created. The manifest aim of Behar's article was to convince the public that these efforts were a *sham*, that improper and criminal activities were ongoing under CSI's new leadership. In furthering that aim, respondents cannot hide behind their knowledge of the allegations of past misconduct to shield knowing or reckless false statements about more recent events. *See Harte-Hanks Communications*, 491 U.S. at 682.

Respondents' argument again illustrates the improper assumption of monolithic reputation. It is not true that *moral* identity coincides with identity of name or body, that an individual is properly deemed "guilty" of one act because he is alleged to have committed other, previous wrongful acts. See *Liberty Lobby*, 746 F.2d at 1568 (Scalia, J.). Thus, journalists should not be excused, on summary judgment, for making defamatory statements regarding one act whenever they have knowledge of allegations concerning other, previous acts. Such a principle would merely create "actual-malice-proof" journalists and thereby, indirectly, perpetuate the justly criticized libel-proof plaintiff doctrine.[5/] The proper inquiry is whether a *specific*

5/ In addition to Justice Scalia's criticism in *Liberty Lobby*, see, *e.g.*, J. H. King, Jr., *The Misbegotten Libel-Proof Plaintiff Doctrine and*

statement was made with actual malice. *Masson*, 501 U.S. at 523 ("[t]he question of incremental harm does not bear upon whether a defendant has published *a statement* with [actual malice]") (emphasis added). Precisely the *specificity* of the inquiry forbids a court from imposing a pessimistic rule of law that contradicts the very principle of ordered liberty that forms the basis of the Court's free speech jurisprudence.

4. Respondents' Opposition Highlights the Need for the Court to Clarify that *Sullivan* Does Not Mandate Application of the Actual Malice Rule to Nominal Damages Claims Designed to Redeem Reputation

Respondents argue that the costs of litigation in defending claims for nominal damages are such that actual malice protection is, and must be, extended to the media even in such cases. But the Court has never held that the First Amendment protects large, multinational media organizations from the processes of litigation to which everyone else in America is subjected. Indeed, this argument was rejected in *Herbert* v. *Lando*, 441 U.S. 153, 176 (1979) (*Lando I*):

> It is suggested that the press needs constitutional protection from these burdens [of discovery] if it is to perform its task ... Only complete immunity from liability for defamation

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the "Gordian-Knot" Syndrome, 29 Hof. L. Rev. 343, 345-46 (2000) (stating that the libel-proof, incremental harm and related doctrines create "defamation Untermenschen").

> would effect this result, and the Court has regularly found this to be an untenable construction of the First Amendment.

Id. Respondents point out that in *Lando I* the actual malice rule was applicable because substantial rather than nominal damages were sought, and emphasizes that the Court has not yet specifically held that libel plaintiffs can seek nominal damages without undergoing the burdens imposed by that rule. That, of course, is precisely why petitioner has asked the Court to clarify this important question of law.[7/]

CONCLUSION

The petition should be granted.

Dated: July 24, 2001

Respectfully submitted,

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7/ Respondents also argue that the district court rejected petitioner's claim for nominal damages as "untimely." The court of appeals, however, rejected CSI's argument on this point *on the merits*, holding that a public figure plaintiff must prove actual malice even to recover nominal damages (Pet., App. A, 16a, n. 3). The court of appeals understood that the claim was inherent in CSI's original complaint, and that the district court, at the least, had supplementary jurisdiction over it.